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February 7, 1997

Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: IB Docket No. 96-261

Dear Mr. Caton:

Transmitted herewith, on behalf of ABS-CBN Telecom, North America, Inc. (ABS-CBN) are an original and nine copies of its "Comments" in the above referenced proceeding to establish new U.S. dollar "benchmarks" for the settlement rates paid by U.S. International Message Telephone Service (IMTS) carriers.

Any questions regarding the above should be directed to the undersigned.

Sincerely yours,

Gregory C. Staple

cc by hand delivery: Donald Gips
Diane Cornell
Kathryn O'Brian

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Settlement Rates	)	IB Docket No. 96-261
	)	

Comments of ABS-CBN Telecom, North America, Inc.

ABS-CBN Telecom, North America, Inc. (ABS-CBN Telecom),[1] by its attorneys, hereby comments on the Commission's December 1996 rulemaking notice [2] proposing to establish new U.S. dollar "benchmarks" for the settlement rates paid (and received) by U.S. International Message Telephone Service (IMTS) carriers.

A. Introduction

ABS-CBN Telecom supports the FCC's desire to establish "settlement rates that more closely resemble the level that would be established in a competitive market for termination of international services."[3] However, the proposals advanced in the Benchmark NPRM are misguided and lack adequate factual support, at least as regards certain non-dominant U.S. carriers, and as to the proposed settlement benchmark for the Philippines. Where competing, non-

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[1] ABS-CBN Telecom is a new U.S. international carrier granted Section 214 authority last year to provide competitive facilities-based switched and private line services between, inter alia, the U.S. and the Philippines. See Order, Authorization and Certificate, File No. I-T-C-95-522, DA 96-592, released April 16, 1996. The company is affiliated with International Communications Corporation (ICC), a Filipino facilities-based international carrier in which NYNEX Corporation holds an indirect 25% interest.

[2] Notice of Proposed Rulemaking, IB Docket No. 96-261, FCC 96-484, released December 19, 1996 (Benchmark NPRM).

[3] Id. at ¶ 3.

dominant facilities-based carriers exist at both ends, the Commission should first rely upon commercial negotiations between such carriers, not regulation, to achieve its goals. This approach was endorsed in the agency's November 1996 International Settlement Policy (ISP) Flexibility Order.[4]

In contrast, the adoption of new benchmark rates for at least 65 countries would have the practical impact of greatly expanding the ISP -- and micromanaging settlements and proportional return arrangements [5] -- on many routes and for many carriers where the ISP should be relaxed. The large and costly administrative burden which a new benchmark regime would place upon the FCC and tens of international carriers simply cannot be justified where non-dominant carriers are involved at both ends of the route. For these and other reasons, we submit that where a non-dominant U.S. carrier is corresponding with a non-dominant foreign carrier, regulatory forbearance not new rules will best serve the public interest and meet the agency's deregulatory mandate.[6]

[4] Regulation of International Accounting Rates, CC Docket No. 90-337, Phase II, Fourth Report and Order, FCC 96-456, released December 3, 1996 (Flexibility Order).

[5] For example, because the ISP still mandates a 50/50 (i.e., non-cost based) split of the accounting rate on any given route, the non-50/50 settlements which would logically flow from any benchmark regime (i.e., to reflect the disparity in national settlement costs) would require the FCC to review a very large number of new ISP waivers on an ongoing basis.

[6] Under Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160 (1996), the adoption of any new FCC price regulation for competitive services faces a significant burden of proof.

B. The Proposed Benchmarks Are Unsupported By The Record And Fail To Account For Local Interconnection Costs Paid By Competing International Carriers

1. The FCC's Benchmark Methodology Is Inappropriate For Competitive Markets And Radically Understates The Actual Termination Costs Of Competing Carriers In The Philippines

The Benchmark NPRM proposes to calculate country-specific and income-banded benchmarks (reflecting a country's GNP per capita) by adding the prices for the three major foreign network components used to terminate U.S. originated international traffic. Specifically, the FCC proposes to sum: (a) the tariffed prices for the international transmission and national network components and (b) the price for the international gateway switching component -- a total which is collectively referred to as the "tariffed components price" or TCP.[7] Using this methodology, the FCC's International Bureau calculated the TCPs for 65 countries, including the Philippines.[8] The Benchmark NPRM uses these calculations as the basis for fixing the upper end of the proposed benchmarks.

Thus, in the case of the Philippines, a middle-income country, the TCP is calculated to be 23.9¢ per minute reflecting the following per minute component costs: 6.5¢ - international transmission; 4.8¢ - international switching; 12.6¢ - national extension.[9] The upper range of the benchmark for other middle income countries -- 19.1¢ per minute -- was apparently derived in a similar manner.[10]

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[7] See e.g., Benchmark NPRM at ¶¶ 35-36.

[8] See "Foreign Tariffed Component Prices", International Bureau, Telecommunications Division, FCC (December 1996) (hereafter, TCP Report).

[9] Benchmark NPRM, supra, Appendix E.

[10] Benchmark NPRM at ¶ 47. According to the Commission, the TCP for the 30 middle-income countries selected by the International Bureau was calculated and then a "simple average" was taken to determine the TCP benchmark for each country falling into this economic development category. While over 80 countries are classified as middle income by the World

While this methodology may seem theoretically sound as one means of estimating the traffic termination costs incurred by foreign carriers, in practice this approach is likely to be an unreliable guide to the termination costs for many foreign carriers, especially for new facilities based carriers which face high domestic interconnection charges to terminate traffic on the incumbent carrier's network. The TCP Report wrongly assumes that the cost of the national extension[11] -- typically 50% of the TCP or more -- can be estimated for all countries based on the retail tariffs charged for domestic telephone service, by rate band, adjusting for the geographic distribution of inbound traffic. This may be so in a monopoly market where all international traffic is terminated on a single network. But, in competitive markets, such as the Philippines, where there are multiple carriers and traffic may transit one or more networks prior to termination, this assumption is unfounded.

For example, in 1996 ICC and other new Philippine international carriers had standard interconnection contracts with the Philippine Long Distance Telephone Company (PLDT), the dominant Philippine carrier, which required a $.35 per minute payment for international calls terminating in metro-Manila, plus up to $.15 per minute more for calls terminating elsewhere. PLDT recently has proposed to reduce the metro-Manila call termination charge to $.28 per minute. Even so, this "national extension" cost, which applies to the bulk of U.S.-originated traffic terminated by competing carriers (PLDT still controls approximately 80% of Philippine

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Bank (See Benchmark NPRM, Appendix D), only 30 countries were included in the International Bureau Study, allegedly because these countries have the greatest traffic volume with the U.S. (See TCP Report, supra, at p. 5.) No evidence is presented by the FCC as to whether the TCPs of these 30 countries are representatives of the TCPs for the 80 countries as a whole. Nor does the TCP Report or the Benchmark NPRM state how the TCP for middle income countries varies with the volume of traffic sent to the U.S.

[11] The national extension component is said to consist of "national exchanges, national transmission, and the local loop used to distribute international service within a country." Benchmark NPRM at ¶ 37.

exchange lines), is more than twice the $.13 national extension cost estimated by the Bureau. Hence, although the tariff price for the national extension may reflect PLDT's termination costs -- it certainly does not provide a proxy for the actual traffic termination costs of ICC and other new carriers.

In these circumstances and prior to reform of the interconnection regime in the Philippines, adopting a benchmark rate of $.19 or even $.24 per minute -- approximately half the domestic interconnection cost for many calls -- would drive out the very competing carriers which the FCC has said it wishes to encourage. In competitive markets, where domestic interconnection contracts govern the actual termination costs of most competing carriers, an alternative methodology which takes such contracts into account must be used to calculate the cost of the national extension. The TCPs for countries falling into this group cannot rationally be averaged with the TCPs of countries having a monopoly regime.

2. The Proposed Benchmarks Are Impermissibly Based Upon Private, Non-Record Data Supplied By A Chief Competitor To ABS-CBN Telecom

The FCC's TCP methodology is also defective because it cannot be independently verified. Crucial data upon which the FCC relies was apparently supplied, in confidence, by AT&T Corp.; has not been placed in the record; and apparently is not now in the Commission's files.

AT&T competes directly with ABS-CBN Telecom and is a WorldPartners ally of PLDT, the chief competitor of ICC, the ABS-CBN Telecom affiliate in the Philippines. AT&T is also the primary U.S. correspondent of PLDT and jointly owns the Subic Telecommunications Company, Inc. with PLDT. We have shown above that, in the Philippines, adoption of the FCC's proposed benchmarks would be likely to benefit PLDT, at the expense of other Philippine carriers, such as ICC, making AT&T and its Philippine ally, PLDT, the primary winners. In these circumstances, the AT&T data and, regrettably, the proposed FCC benchmarks derived therefrom, are inherently suspect.

The AT&T data at issue involves geographic distribution of U.S.-originated calls -- a crucial input for estimating the TCP for the national extension. As stated by the Bureau, "[t]he first step" in calculating the TCP for the national extension "is to determine the distribution of international calls from the United States within each country" so that they can be "distributed among [tariff] service classification, time periods and destinations ..."[12] "The result," the Bureau continues, "is a [TCP] figure that is weighted by each country's distribution of minutes from the United States among service and tariff rate categories ... and the distribution of calls throughout the country." However, the TCP Report does not provide any call distribution data by country or any data on the distance from the foreign gateway switch to the termination point for any call -- necessary information for grouping the calls into domestic tariff categories. As to the call data, the TCP Report simply states that the "distribution of minutes for each country was determined from information collected on customers' calls during a three month period that began on January 6, 1996" with a sample taken "for the same one-hour period of the week."[13]

Counsel has been advised by the Bureau's staff that this call data was in fact made available to the Bureau, in confidence, by AT&T but that the Bureau apparently was not permitted to retain a physical copy of said data. Hence, neither the Bureau nor any interested party may now examine the data to determine whether the Bureau's TCP calculations are accurate. Nor, perhaps more importantly, are interested parties able to judge whether the call distribution used

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[12] TCP Report, supra, at p. 13.

[13] TCP Report, supra, at p. 13. The Bureau provides no indication whether said data is representative of total U.S. outbound data on any of the 65 countries examined. Yet, AT&T's route-by-route market share is known to vary by 50% or more. See e.g., "Trends In The International Telecommunications Industry", Industry Analysis Division, Common Carrier Bureau, FCC, August 1996, at pp. 49-51. AT&T's customer base also is likely to differ in significant respects from that of smaller U.S. carriers.

by the Bureau and the gateway to termination point distances is likely to overstate or understate the actual termination costs, and hence the TCP figure calculated by the Bureau.[14] Despite the very large weight which the national extension typically is accorded in the TCP for any given country -- and thus for the average TCP by income category -- the TCP Report and the Benchmark NPRM essentially ask that these TCPs be taken on faith.

The FCC must be more forthcoming if it expects any of its TCP benchmarks to survive judicial review or to be viewed as equitable or impartial by AT&T's competitors.[15] It is elementary that an administrative agency may not adopt a rule or standard which is substantially derived from secret, off-the-record data.[16] It is also well established that an agency rulemaking proceeding may be fatally tainted if the agency has prejudged the outcome based on ex parte

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[14] Neither ABS-CBN Telecom, nor its Philippine affiliate have access to representative Philippine call termination data. ABS-CBN Telecom estimates that its 1996 market share of outgoing U.S. IMTS traffic was a less than 1%; ICC estimates that it terminated less than 5% of U.S. originated IMTS traffic in 1996. In any event, ICC's local exchange concession is quite restricted geographically.

[15] The FCC's cavalier acceptance of the AT&T data to derive network termination costs in this docket contrasts sharply with the agency's continuing scrutiny of network proxy cost models advanced by various interested carriers in the agency's contemporaneous access charge and universal service dockets. Notably, in the latter proceeding, the Joint Board's Recommended Decision, CC Docket No. 96-45, FCC 96J-3, released November 8, 1996 and endorsed by FCC Commissioners Hundt and Ness, expressly declined to consider a proxy cost model provided by Pacific Telesis (Pac Tel) because underlying proprietary data was not part of the record: "The [model] suffers from the flaw that significant amounts of important values and information are considered proprietary." Id. at ¶ 279.

[16] United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether."); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of ... data that ... is known only to the agency."), cert. denied, 477 U.S. 921 (1974).

presentations from interested parties or otherwise.[17] Indeed, the U.S. Court of Appeals has stated that where an agency fails to disclose relevant information that has been presented to it, "a reviewing court cannot presume the agency has acted properly, but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary."[18]

In view of the foregoing, ABS-CBN Telecom suggests that the FCC promptly require AT&T to place in the record, and make available for public inspection, all of the U.S. international call distribution data supplied to the Bureau. Alternatively the Commission should place in the public record other call distribution data which would support the TCP it has proposed. Thereafter, all parties should be provided with a further opportunity to file comments.

C. To Avoid Destabilizing The Newly Competitive Philippine Telecommunications Market, Adoption Of A New Philippine Benchmark Should Be Deferred

Even if the record here were adequate to set a new settlement benchmark for the Philippines, which it plainly is not, the status quo (i.e., the 1992 benchmarks[19]) should be maintained until competitive telecommunication carriers in the Philippines are more firmly established.

During his visit to the Philippines in December 1996, the FCC Chairman underscored the U.S. interest in a competitive Filipino market and held out the Philippines as an emerging success

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[17] See, e.g., Home Box Office Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) [striking down FCC rules due to agency's reliance on ex parte materials].

[18] Id. at 54 (citations omitted) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 419-20 (1971)).

[19] See Regulation of International Accounting Rates, Second Report and Order, 7 FCC Rcd 8040 (1992).

story for other Asian markets.[20] The Chairman's remarks were prompted, in part, by the Philippines' historic decision in 1994 to grant eleven new dual-service concessions for international gateway facilities (IGF) and cellular radio or local service. In so doing, the Philippines sought radically to increase the number of exchange lines from approximately 1 line per 100 people in 1993 to 5 or more lines per 100 people in the year 2000. To date, this program has worked: competition has stimulated PLDT to almost double its base of access lines to over 1.3 million lines, and the new IGF carriers are collectively committed to construct over 4 million additional lines.

However, the success of the Philippines' unique dual concessions, the pace of local network construction by new carriers and the funding for new facilities are dependent in large part on the stability of the current international settlement regime.[21] This is exactly the wrong time for the FCC to signal Philippine carriers and investors that a 50% or greater cut in international settlements rates is not far off. As the market becomes more competitive -- and as non-dominant carriers are granted flexibility to negotiate alternative arrangements -- international settlement rates will fall. Thus, if the FCC truly wishes to see the Philippines' experiment succeed, as Chairman Hundt stated but two months ago, the agency should defer adoption of a new benchmark for the Philippines, at least pending a country-specific review of all relevant factors.

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[20] See "Speech of Reed E. Hundt, Chairman, Federal Communications Commission," Philippines, dated December 2, 1996, at pp. 4 and 6.

[21] Shortly after the new IGF concessions were issued, the U.S.-Philippine accounting rate for IMTS was reduced from $1.68 to $1.20 per minute. Then, in 1996, to remain competitive, ICC and other Philippine carriers agreed to match the $1.00 per minute accounting rate negotiated by AT&T and PLDT even though the new settlement rate of $.50 per minute will barely cover the per minute PLDT interconnection charge for terminating calls outside metro-Manila. Thus, any further reduction in the accounting rate would only benefit PLDT and its foreign ally, AT&T, to the detriment of competing carriers and the build-out of the Philippine local exchange network.

C. Conclusion

The Commission should refrain from adopting benchmarks for non-dominant U.S. carriers corresponding with non-dominant foreign carriers. Settlement rates for such carriers are most likely to approach cost if such carriers have the flexibility to negotiate interconnection terms as they see fit, the ISP notwithstanding.

In any event, the current record is inadequate to prescribe a new benchmark rate for the Philippines and for middle income countries collectively. The estimated national extension cost for Philippine carriers overlooks the actual domestic interconnection charges now paid by competing carriers -- charges which are barely covered by the current settlement rate and are approximately twice the estimated country-specific or income-banded TCP. As such, enforcement of the FCC's proposed benchmarks in the Philippines would quickly drive competing carriers from the market because they would be required to pay out in domestic interconnection charges roughly twice what they receive from their U.S. correspondent -- thus allowing the dominant domestic carrier, PLDT to remonopolize the market. For this and other reasons, the FCC should defer adoption of a benchmark rate for the Philippines, at least until it can conduct a country-specific review of all the relevant factors.

Respectfully submitted,

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By ______________________

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